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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

STANDARD OIL COMPANY OF CALIFORNIA, et al.,
Petitioners,

VS.

THE CITY OF LONG BEACH and
THE STATE OF CALIFORNIA,
Respondents.

EXXON CORPORATION and TEXACO INC.,
Petitioners,

VS.

THE CITY OF LONG BEACH, et al.,
Respondents.

RESPONSE TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

This case does not raise the questions posed by petitioners. The issue is whether the Court of Appeals erred in holding that triable issues of fact foreclosed summary judgment in this antitrust case charging petitioners with a successful conspiracy to fix prices when respondents produced *direct* evidence that:

1. petitioners completely controlled the relevant market;

2. all petitioners, except Exxon, expressly agreed on secret formulae fixing the prices at which they exchanged crude oils carried on their proprietary crude oil pipelines; Exxon joined its co-petitioners in performing that agreement from which no petitioner deviated during the relevant years;

3. petitioners' published ("posted") prices paid to respondents and to other independent producers of crude oil were significantly lower than the prices petitioners paid to each other for identical crude oils using their secret price formulae;

4. petitioners never competed with each other in trading crude oil on their exchange market or in the public market even in times of acute shortage of crude oil;

5. all petitioners engaged in other anticompetitive conduct affecting price, including the rigging of prices for Alaska crude, for the avowed purpose of protecting their artificially depressed posted prices for California crude oils;

6. respondents produced both direct and circumstantial evidence that petitioners' purpose was to fix higher prices for crude oils traded with one another and lower prices for crude oils bought from respondents and that the price fixing agreement enabled petitioners to pay respondents nearly $1 per barrel less than the competitive price for crude oil they extracted under their 35-year contract with respondents.

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RESPONSE TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents respectfully request that a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit be denied.

Respondents agree with the jurisdictional statement and the statutes involved as stated by petitioners.

STATEMENT OF THE CASE

Introduction

Respondent, City of Long Beach ("Long Beach"), as both oil field proprietor and trustee for respondent State of California, holds the mineral rights to the greater portion of the Wilmington oil field, one of California's largest crude oil fields.[1]

In 1965, Long Beach, acting for itself and as trustee for the State of California, opened for bidding the total production of Tract No. 1, the lion's share of the Wilmington oil field. ER 823. Texaco, Humble (now Exxon), Union, Mobil and Shell successfully bid for the Field Contractor's share of the total production of Tract No. 1. Under the 35-year "Contractors' Agreement", the joint venture assumed the right and obligation (1) to operate the field for respondents on a day-to-day basis and (2) to buy 80 percent of the total crude production, subject to "sell-off" provisions.[2] After lengthy negotiations and public hearings, an elaborate pricing provision was negotiated to assure that respondents would receive competitive market prices.[3]

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[1] Before production commenced under contracts with the petitioners, the total recoverable reserves exceeded one billion barrels of crude oil. ER 1052 (Unless stated otherwise all "ER" cites are to the excerpt of record in Ninth Circuit Appeals Nos. 86-5859 and 86-5860).

[2] Ninth Circuit appeals Nos. 87-6301 and 87-6628 ("*Long Beach I* Contract") Excerpt of Record, ER 799 ¶ 6, 342.

[3] ER 3731-35. The pricing provision is Article 9 of the Contractors' Agreement, which became effective April 1, 1965. *Long Beach I* Contract ER 556-68. Socal and ARCO were also parties.

Respondents filed their antitrust claims in 1975 charging petitioners and former defendant Atlantic Richfield Company ("ARCO")[4] with conspiring to fix prices they paid for respondents' crude oil from 1971 to 1975 (later through 1977). The case was pretried for a decade during which petitioners filed 16 summary judgment motions. On June 19, 1985 the district court entered a two-paragraph summary judgment dismissing the antitrust claims. Three months later, that court issued a memorandum decision revealing that it had weighed the evidence, resolved conflicts in the evidence against respondents and decided issues of credibility in petitioners' favor.[5] Respondents appealed and the Court of Appeals reversed holding that triable issues of fact foreclosed summary judgment. Petitions for rehearing and suggestions for rehearing *en banc* were denied on September 22, 1989.[6]

Contrary to petitioners' contentions, proof of the conspiracy did not rest only on circumstantial evidence, and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) is inapplicable.

Petitioners' brief completely ignores the abundant evidence produced by respondents in opposition to their summary judgment motions that *prima facie* established every element of their § 1 conspiracy case. Instead, they argue as if the district court's findings were made in a non-jury case following a trial on the merits.

Respondents introduced *direct* evidence that:

1. The petitioners, together with Getty and former defendant ARCO, were the "Majors", who together controlled the relevant market as transporters and refiners of crude oil, supposedly in

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[4] ARCO settled with respondents in 1984.

[5] The memorandum decision is set forth in Socal petitioners' App. C. An earlier decision denying summary judgment is set forth as App. D to Socal petitioners' brief. No additional evidence was produced by petitioners in the interim.

[6] The order denying rehearing is annexed to Socal petitioners' brief, App. B.

horizontal competition with one another at the production, transportation, refining and marketing levels of the petroleum industry;

2. Standard Oil Company of California ("Socal"), Mobil Oil Corporation ("Mobil"), Shell Oil Company ("Shell"), Union Oil Company of California ("Union"), Texaco Inc. ("Texaco"), former defendant ARCO and non-defendant Getty Oil Company entered into an express agreement, negotiated in 1961-62, to trade crude oils ("crude") with each other over their interconnected proprietary pipelines using secret 3-cut exchange formulae setting prices nearly $1 per barrel higher than those they publicly announced ("posted") and paid to respondents and to other independent California producers for the identical oil they exchanged;[7]

3. The Majors' 3-cut exchange agreement had an immediate depressing effect on posted prices. Thereafter, and throughout the relevant years, posted prices for heavy California crudes remained flat despite gross changes in supply and demand;

4. The Majors, price posters and non-posters alike, zealously adhered to a policy never to pay higher than posted prices to independent producers and never to bid against each other for crude on the basis of price even when experiencing severe shortages of California crudes for their refineries;

5. The Majors regularly shared advance pricing and other sensitive proprietary information; and

6. The Majors rigged the prices for Alaska crudes in order to maintain the depressed prices for competing California crudes.

Contrary to petitioners' argument, respondents have not relied on the doctrine of "conscious parallelism" to establish their *prima facie* case because their direct evidence was more than sufficient

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[7] ER 426, Finding 19. Texaco withdrew from the negotiating sessions before the last meeting on advice of counsel, but shortly after the 1962 agreement it rejoined the conspiracy and traded crudes on 3-cut exchanges under the new rules. Exxon Corporation ("Exxon", formerly "Humble") joined the other petitioners in the scheme in the late 1960's when it began trading on 3-cut exchanges.

to demonstrate concerted action to fix prices. Although certain language in the opinion of the Court of Appeals is inartistic, that Court unmistakably recognized that respondents' evidence *prima facie* proved petitioners' price-fixing agreement, that all petitioners performed that agreement and that the scheme succeeded in depressing prices paid for respondents' oil.

Some knowledge of the unique characteristics of the relevant market is necessary to an understanding of this price-fixing scheme and why it worked for so many years.

Essential Characteristics Of The Relevant Market

The geographical market is California, which was isolated from the other U.S. refining areas because crude oil pipelines did not connect California with other districts.[8]

The Majors not only dominated the relevant market, they *were* the market. Aside from some small independent refiners, the Majors were the vertically integrated refiners, crude transporters, buyers and sellers of refined petroleum products in California. Before Exxon entered the California refining market, the Majors combined owned 90 percent of the refining capacity, controlled almost all the tanker terminal facilities and, with minor exceptions, owned all of the crude oil pipelines.[9] All of them were members of the "pipeline club".

The key element in the creation and successful maintenance of the price-fixing scheme is the lack of common carrier crude oil pipelines in California. The pipelines were all privately owned by the Majors and operated as proprietary carriers. The lack of common carrier pipelines was unique to California.[10]

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[8] ER 2572A, 862.

[9] ER 784, 862, 888A. These figures include Phillips and Getty, which were at various times integrated petroleum firms in the 1960's.

[10] ER 862, 888A.

The pipeline owners were well aware of the market power the proprietary pipelines created.[11] In an attempt to prevent the pipelines from becoming common carriers under California law, pipeline owners passed title to the crude in transit under exchange agreements.[12]

The interconnected crude pipelines were operated as an integrated system by which the Majors moved huge volumes of crude through each other's pipelines. Lack of access to the system would have put a refiner at an enormous competitive disadvantage.[13] No Major by itself had sufficient pipeline capacity to serve its refineries. Texaco had only 5 percent of total pipeline capacity and considered itself "at the mercy of other companies in the transporting of our crude oil supplies".[14] Exxon owned no trunk pipelines.[15] The Majors were, therefore, interdependent.

The Majors had a policy of denying pipeline access to all independent crude producers. ER 2490. Such producers had to sell their crudes to pipeline owners at artificially depressed posted prices. Pipeline control prevented competition at the wellhead.[16]

Posted prices are publicly announced prices a refiner will pay producers in an oil field. Prices are announced for each field

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[11] ER 1502, 886, 1253, 1236, 2932-34. "[W]e are quite limited in owned pipeline and tanker facilities and dependent on our competitors for the transportation of the major portion of our West Coast crude . . . ." ER 1258. See also ER 1255.

[12] Cal. Civ. Code § 2168; Cal. Pub. Util. Code §§ 211, 228; ER 2490.

[13] ER 865, 1054.

[14] ER 1253, 4226.

[15] ER 862, 3301.

[16] ER 886 [Exxon document] ("[A]nother important factor that contributes to control of prices by the large purchasers is the absence of common carrier pipeline facilities. This reduces the producers flexibility in marketing his production."); ER 865 ("[P]roducers in California have been unsuccessful in establishing higher crude prices because of lack of controlled outlet, due in no small part to crude oil pipeline ownership by the majors.")

separately by degrees of gravity using a scale established by the American Petroleum Institute ("API"). The heavier the crude, the lower is the API gravity number and its price, and vice versa. These price differences are called "gravity price differentials" ("GPD") or "gravity penalties". Posted prices are supposed to reflect the fair market value for the crude oil. *Long Beach I* Contract ER 604 ¶ 22. During the 1962-65 contract negotiations, petitioners repeatedly assured respondents that posted prices represented the "true market price" of the crude oil.[17] Petitioners induced respondents to adopt a pricing provision drafted by Socal which used petitioners' postings as the central pricing mechanism.[18]

Socal, was the price leader, and the other posters followed its lead; non-posters adhered to posted prices.[19]

During the relevant years, the posted gravity penalty for respondents' heavy crude was generally 7 cents per degree API per barrel[20] but everywhere else in the country the prevailing gravity penalty was only 2 cents.[21]

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[17] *Long Beach I* Contract ER 589, 700, 681, 650, 585.

[18] *Long Beach I* Contract ER 648, 655, 660.

[19] ER 4126-29, 4147-48, 2924. *Long Beach I* Contract ER 744. Except for temporary aberrations, posted prices were uniform. *Long Beach I* Contract ER 743-44.

[20] ER 2540, *i.e.*, for each degree API Wilmington crude declined, the posted price fell 7 cents per barrel (42 gallons).

[21] ER 2446. A senior East Coast Shell crude supply executive wrote: "[C]ontrary to all principles of sound economics and equity (a) we have artificially maintained dual crude oil price standards in the U.S.—high for EOR [east of the Rockies] and low for WOR [west of the Rockies], (b) furthermore the WOR price structure has been distorted (that is, the gravity gradient) by the action of a few large majors WOR because the remaining segment of industry, including Shell, neglected to exercise its proper influence in the market place...." ER 2214. [Bracketed material added].

THE PRICE FIXING AGREEMENT

A. Events Leading To Development Of The 1962 Agreement

By the early 1960's improved refining technology made it possible to refine increasingly higher percentages of gasoline and other valuable light products from heavy crudes. ER 2053. The Majors' old exchange system no longer accurately accounted for crude values, and they could not agree on settlements of their exchange account imbalances.[22] By the early 1960's, the Majors knew that heavy crudes were especially underpriced.[23] A Major buying heavy crude at posted prices did not want to exchange it for a lighter crude at posted prices because it would thereby lose the benefit of underpricing of the heavy crude.[24] The Majors either had to abandon their old system and post competitive prices or radically alter the rules for pricing on exchanges. They chose the latter course.[25]

B. The Secret Meetings Of The "Exchange Committee"

During 1961-62, the Majors (excluding Exxon which had not yet entered the market) held five secret meetings to revise the system. Participants in the "Exchange Committee" meetings were crude supply managers of the Majors, including Getty and former defendant ARCO. Their purpose was to create a new mechanism for exchanging the Majors' crudes at prices more nearly reflecting their actual values.[26]

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[22] ER 1235, 1237, 2486, 2487, 2488, 3055, 3724-25.

[23] ER 2485. By 1961, the underpricing had become so severe that a Socal executive warned of adverse legal repercussions. ER 2031. By 1962, heavy crudes which were posted at about $2.50 per barrel, were underpriced by $1 per barrel. ER 1809.

[24] ER 1252, 1339, 2485.

[25] Huge volumes of crude moved on transportation exchanges and made exchange terms important to the Majors. The exchange market was large because enormous volumes of California crudes were carried by petitioners' pipelines. ER 4233-43.

[26] Numerous documents from petitioners' files reveal their purpose. ER 1339-43, 1252, 1235, 1237, 2486. A Mobil account of the final

Contemporary reports describe various methods considered for exchange pricing. The committee decided to retool the old 3-cut exchange system.[27] Devising a means for pricing "Cut 3" was an important and difficult problem because 60-70 percent of an average heavy crude is cut 3,[28] and it is in cut 3 that the most significant quality, i.e. gravity, differences among crude oils exist.[29] A club member trading away a crude which contained a significant amount of a more valuable, lighter residuum wanted to be compensated for receiving a less valuable, heavier residuum.[30] One proposal was to agree on so many cents in cash for each degree of difference in cut 3 gravities. That idea was quickly discarded because, if discovered, it transparently exposed the disparity between posted and exchange prices, and its price-fixing character was obvious.[31]

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meeting stated that the revision was agreed upon because "it was unanimously felt that an improved 3-Cut method was the most beneficial and equitable approach to the problem in view of disparities in California crude postings. . . .", i.e., posted prices did not reflect value of the crudes to the refiner. ER 1339.

[27] ER 1240-46, 1339-41. A "cut" is a distillation yield. The "cut" points are temperatures at which products are distilled from crudes in a laboratory test. Under the new 3-cut exchange rules adopted in 1962, "cut 1" is the product distilled by 400° F. It is essentially unfinished gasoline. "Cut 2" is the product distilled between 400° F and 550° F. It is essentially stove oil. "Cut 3" is the "residuum" and is similar to bunker fuel oil. ER 2189. In a sophisticated refinery, residuum can be further refined into lighter products using cokers and other advanced refining equipment. ER 1371.

[28] The cuts only exist on paper as a pricing and accounting mechanism. Physical cuts were not traded because sophisticated refineries do not produce them. Only whole crudes are transported on the pipelines. ER 2480, 1229, 2488, 1219.

[29] ER 4207. Cuts 1 and 2, were not considered to vary greatly in quality and so were fungible under the adopted formulae.

[30] ER 1188, 2459.

[31] ER 2168. Shell's counsel advised Shell's Exchange Committee representative that a general agreement on a gravity price differential should be avoided. ER 2220.

A more inscrutable proposal by Mobil was eventually accepted by the Exchange Committee. Cut 3 gravity differences were translated into a fictitious volume adjustment under a formula based upon specific gravities of cuts 3. The higher the gravity, the higher the cut volume credited. ER 2170.[32] The cut 3 volumes credited on petitioners' books translated into a price. ER 3825, 419. When the formula is decoded, the gravity penalty for cut 3 is about 2 cents per degree API.[33] The code became the price-fixing system used by all petitioners throughout the relevant years.

C. The 1962 Agreement Fixed The Price Of Crudes Traded In The Exchange Market

The formulae permitted the Majors to use a gravity penalty of about 2 cents instead of the 7 cent posted penalty. The agreement eliminated competition among the Majors in the determination of crude prices in the exchange market.[34] The formulae did not, as petitioners argue, reflect different Majors' refining values. As ARCO put it: "It is desirable that all companies agree on a single value differential to be applied to all crudes." ER 1191. And agree they did. The formulae set the exchange market price, not competitive bidding among refiners based on their estimates of their refining values. The pact was a naked price-fixing agreement among horizontal competitors. As this Court stated in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-23 (1940): "[P]rices are fixed . . . if by various formulae they are related to the market prices. They are fixed because they are agreed upon." Crude oil exchange prices in California were agreed upon in 1962 and for at least 15 years thereafter. A Shell official in New York, unaware of the purpose of the scheme, commented on the "frantic lengths [to which] some people will go to avoid using the

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[32] Adjustments in cut 3 volumes were made on trading partners' books of account. The volumetric adjustment of cuts 3, and agreed equality for all cuts 1 and 2, fixed the value of whole crudes traded on 3-cut exchanges.

[33] ER 2171, 2507.

[34] A 1970 Mobil document crisply stated the impact of the formulae: "[I]n the Texaco [pipeline] system we would be buying gravity at less than 2 cents/barrel/° API. . . ." ER 1771-72.

U.S. dollar as the medium of exchange." He added, "[o]f course if you have to deal with people who only deal in sea shells you will have to go along. . . ." He concluded: "Before accepting the specific gravity proposal [for adjusting gravity differences in cuts 3] would suggest you try to get one or more of the sponsors to . . . reconcile it with their crude oil price postings."[35]

D. The Formulae Insulated Posted Prices From Competitive Market Forces And Permitted Petitioners To Maintain Depressed Posted Prices

Petitioners removed crudes traded on 3-cut exchanges from the posted price market and created a two-tiered price structure for the same oil.[36] Petitioners eliminated competitive pressures to increase posted prices by setting exchange market prices through their secret agreement instead of negotiations among the exchange partners. As a result, prices in the public market were profoundly and anticompetitively affected. Absent agreement on exchange prices among members of the pipeline club, the Majors would have had to raise posted prices.

Respondents' economic experts concluded:

> Exchanges, bereft of the concealment afforded by three-cut accounting, would have to reflect posted prices. Unconcealed exchange premiums would quickly result in higher crude purchase prices. ER 4194.[37]

After the scheme was in place, the posted gravity penalties for heavy crudes almost never fluctuated despite major changes in supply and demand, and posted prices remained flat from 1963-

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[35] ER 2218. See also ER 3003-05, 2217, 3006, 2504.

[36] The Majors exchanged respondents' Wilmington crude among themselves on 3-cut exchanges *before* the oil ever left the oil field, *e.g.*, ER 1891-96, a 3-cut exchange between Socal and ARCO. See also ER 2070, 1070, 1080, 1124, 2999-3000, 3227- 29, 3231.

[37] *Accord*, ER 3416. ("[T]he effect of the three-cut exchange system was to restrain competition for California crude oil and to depress the prices paid for that oil in the field."); ER 3417, ER 414-15.

69.[38] The industry as a whole was in short supply of heavy crudes during most of the 1960's and 70's,[39] and severe actual shortages were acknowledged in many of petitioners' documents.[40] Nevertheless, petitioners never bid against each other nor deviated from posted prices.[41]

Respondents produced unrebutted expert testimony that 3-cut exchanges subverted competitive market forces in setting posted prices and created a two-tiered pricing structure for the same crude. This result could not happen in a competitive market, as Dr. Saving explained:[42]

> In a competitive industry each refiner will maximize profits by consuming each crude oil input up to the point that its marginal value equals the market price. If a refiner has a higher valuation for a crude than the market price, it will

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[38] ER 3854. For example, Exxon required large volumes of heavy crude for its Benicia refinery, yet from the day its refinery began operations, it both projected and experienced actual shortages of heavy crudes. Nevertheless, it failed to act competitively and to offer higher prices for additional supplies. ER 905, 908, 917, 923-25, 927, 930, 935, 937, 944, 981, 984-86, 2161.

[39] ER 935, 1098, 1509, 2199, 2918, 3095, 1723, 1153. Only in 1968 did Union use all of its crude distillation capacity. ER 3495 ¶ 19.

[40] *E.g.*, "Our own demand for U.S. heavy crudes cannot presently be satisfied. About 12,000 barrel capacity of our cokers are unloaded." ER 2397. "Domestic supply from current avails is no longer sufficient to meet running in California." ER 1260.

[41] ER 3147, 3158, 3297-98, 4314, 4315, 4318. Price competition was avoided as a matter of policy and was disparaged as "pirating oil". ER 3147, 3157-59.

[42] Dr. Thomas R. Saving, one of respondents' economic experts, also testified:

> It is not possible in a competitive equilibrium for a crude oil to have two different values. Where two values do persist over time, the only conclusion that can be drawn is that competition has been somehow restrained so that one of the values could be artificially maintained. ER 3707.

> expand its use until the value of the last (marginal) barrel used is equal to its price. ER 3706.[43]

Respondents' economists confirmed the opinions, expressed contemporaneously by defendants' personnel who bought, sold and traded crude oils,[44] that marginal refining values were highly relevant to the determination of a competitive market price and that posted prices bore no relationship to petitioners' refining values.[45]

Petitioners introduced no economic testimony in the district court and have no plausible explanation for the gross and persistent divergence between their marginal refining values and their posted prices.[46]

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[43] This principle is black letter economics. See E. Gellhorn, *Antitrust Law and Economics* at 77-78 (1976), a text cited with approval in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) and in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 n.18 (1977). See also III P. Areeda & D. Turner, *Antitrust Law* 156 (1978) and ER 479, 399-401.

[44] In a 1966 review of Union's postings a senior crude trader observed:

> [T]he ultimate objective in crude pricing would be to relate crude prices to refining value . . . crude prices in California have no relationship to value . . . the 5¢ to 7¢ price spread we have between gravities is wrong and . . . a consistent 3¢ spread appears about what it should be. ER 2240.

[45] Respondents' economists' study of 18,000 of petitioners' refinery values concluded that petitioners and the market did not act competitively. ER 3901-07. See also ER 479-80. Dr. Anderson testified:

> The continuing excess of value over price . . . constitutes by definition non-competitive market performance. ER 3416.

See also ER 3708, 3373-74, 3891-92.

[46] Petitioners confuse the issue by addressing average barrel values, which are irrelevant, rather than last barrel (marginal) values, which are crucial to economic analysis of market behavior. Socal Pet. at 5. Dr. Saving explained:

> When refiners behave competitively, refining value exceeds the cost of acquisition for each barrel *before* the last (marginal) barrel consumed. ER 3707 (emphasis supplied).

E. Secrecy Was Crucial To Two-Tier Pricing

Although posted price exchanges were well known, the fomulae from the 1962 meetings were kept secret for more than a decade. The code was initially cracked in 1974.[47]

When petitioners began purchasing respondents' crude under the Contractors' Agreement in 1965, ARCO insisted upon and received agreements to indemnify it as the pipeline owner if respondents discovered trading of Wilmington crude among Majors at values higher than posted prices and then adjusted prices under the "most favored nation" clause of the Contractors' Agreement.[48]

When this litigation began, the details of the code were gradually revealed by discovery. Some documents translated "sea shells" into cash. Petitioners also delivered refined products to reduce cut imbalances using ratios to convert the cuts to their closest refined product equivalents. Petitioners discussed the need for such settlements at the 1961-62 meetings and agreed on how they would work. ER 2165, 2482, 2464, 1241-43. *E.g.*, petitioners' documents showed that cut-2 imbalances were to be settled by delivery of stove oil on a ratio of 1:1.[49] Because market prices for refined products are published, the prices of cuts were revealed by the conversion ratios. Product settlements showed 3-cut exchange prices were much higher than posted prices.[50]

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[47] The "Rosetta Stone" was a Mobil-Union exchange cut imbalance settlement document inadvertently produced to respondent State at a routine annual audit of Mobil pursuant to the Contractors' Agreement. ER 2256, 1464, 3192. The letter, which was immediately confiscated by a Mobil representative, revealed that price posters Mobil and Union, in their 3-cut exchanges, had placed a value on crude oils in excess of $1 per barrel above posted prices. ER 3737 ¶ 13. Petitioners all adopted a posture of delay and obstructionism when respondents thereafter sought 3-cut exchange valuation data. ER 3714 ¶ 6. See also 3736-37 ¶¶ 11-12.

[48] ER 1070, 1080, 1124-26, 1895, 2069, 3000, 3228-31. Petitioners' secrecy prevented application of the most favored nation clause to adjust prices paid respondents to the higher exchange values. ER 3821.

[49] ER 2165, 1243.

[50] ER 2299, 2248, 2250, 1960, 1961.

F. Petitioners Understood The Purpose And Effect Of Their Formulae

Petitioners each internally discussed the purpose and effects of the formulae in terms of pricing of crude oil[51] and admitted that their purpose was to trade crudes at their true values to avoid posted prices.[52]

Their documents are replete with admissions that posted prices for heavy California crudes were "artificially maintained," "most improper," lacked appropriate "relationship to value," "wrong," "less than true value," "a problem" and "way out of line."[53]

Petitioners internally adjusted for the distortions when they used posted prices in their analyses,[54] *e.g.*, petitioners placed "premiums" above posted prices on the heavier crudes,[55] in order

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[51] ER 2189, 3219-21, 1361-62, 2218, 2077, 2217, 3038-39, 3151, 2171, 2276.

[52] A Mobil memorandum, called the "layman's guide" to 3-cut exchanges, listed as reasons for using such exchanges:

* * *

> (b) the disparity between the posted prices of heavy crudes in relation to light crudes
>
> * * *
>
> (d) crude pipelines are privately owned and operated and no major company has its own complete system to carry its own crudes. ER 1502.

See also ER 2306, 1233-34, 1339, 829, 3285, 2276, 2189, 1362.

[53] ER 2214, 2240, 2031, 1378. Mobil's West Coast Regional Manager for Crude and Product Supply wrote:

> One of the most improper situations existing relative to West Coast crude pricing is the matter of the 5 to 7¢ a barrel increments per degree of gravity. These increments should be no more than 3¢ a barrel and one day this situation will have to be corrected. ER 1378.

[54] ER 2417, 2297, 1981, 1993-94.

[55] ER 1981, 2240-41, 2485, 2231. One company called it "a bogey factor". ER 2231.

to make sound decisions about exploration, production and crude exchanges in the real world.[56]

G. Rigging Alaska Posted Prices Preserved The Benefits Of The California Price Fix

When light Alaska Cook Inlet crudes became available, petitioners faced a major problem because such crudes were primarily refined in California and thus competed directly with light California crudes. ER 1061, 1154-56. Petitioners knew that if they posted a two cent gravity penalty for such crudes, they could not expect to keep the prices of California crudes depressed. Those petitioners who posted prices in Alaska plus ARCO, therefore, knowingly adopted an artificially high 5 cent gravity penalty for light Alaska crudes in order not to "rock the boat" on their artificially high California gravity penalties although (1) their internal Alaska crude valuations justified a 2 cent GPD, (2) they had been trading Alaska crudes using a 2 cent GPD and (3) they knew a 5 cent GPD for Alaska crude was "unrealistic", "indefensible", had "no economic or technological reason" and was contrary to the economic self-interest of each.[57]

H. Petitioners' Price Signalling Helped Maintain Depressed Posted Prices

Petitioners and ARCO frequently communicated among themselves concerning their crude pricing. They provided each other advance notice of price changes, shared internal price forecasts and disclosed to each other calculations for prices and values of specific crudes.[58] Moreover, they told each other the reasons for their future price changes, disclosed their intentions not to change

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[56] ER 2086, 2053, 2062, 2146-48, 1929-32, 2279-81.

[57] ER 1711, 1061, 1075-76, 1144-45, 1154-56, 1496-97, 2065, 2028, 2865, 2874; 1328 ("A reduction in this price spread [the Alaska gravity penalty] would furnish arguments for those wishing to bring the price of heavy California crudes up closer to the light crudes"); 1078 ("The gravity differential change [to 2 cents] threatens California heavy crude price structure").

[58] ER 1851, 2232, 1835-36, 2419, 1122, 2003-05, 2001, 3020-22A, 2421, 2916.

prices over periods of time, discussed circumstances in which they would consider price changes and exchanged internal price forecasts for specific crudes.[59] *See United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978) (exchanges of current price information have "consistently been held to violate the Sherman Act").

Documents reveal petitioners' own recognition that their behavior was "prejudicial to other people in the industry", could be "construed as some sort of price fixing" and was in violation of company policies against telegraphing price changes and should not be committed to writing lest it be publicly exposed.[60]

I. All Of The Petitioners Had Incentives To Fix Low Posted Prices

Each of the petitioners had economic incentives to collude. All but Texaco and Exxon were net buyers of crude at the time of the Exchange Committee meetings. Texaco and Exxon later became net buyers, and all petitioners were net buyers throughout the damage period.[61] By the mid-1960's, Texaco and Exxon had developed refining plans to run heavy crude oils based upon the expectation that heavy crude posted prices would continue to be depressed, and each was dependent on the others for access to pipelines.

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[59] ER 1835, 1851, 1122, 2001, 2003-05, 2419, 2421-23, 3020-22A. A November 1976 Union document is self-described as an "early signal to our competitors . . . to suggest to our competitors that they keep the price of heavy oils low. . . ." ER 2421.

[60] ER 1851, 3068-69, 3291, 3293. Petitioners also exchanged extensive information about West Coast crude availabilities and identities of crudes they were running in their West Coast refineries, although they considered such information proprietary and confidential and would not exchange it elsewhere in the country. ER 2842-44, 3276, 1939, 1941, 1440, 1765; 2815-16, 2846-47, 3101-02, 3103-04, 3282-83, 2965, 3036.

[61] Even when net sellers, participation by Texaco and Exxon was quite rational. They had no means, save risky litigation against their co-petitioners, to alter posted prices, which were set by pipeline owners who were net buyers.

Petitioners argue that none had any motive to depress crude prices when they were net sellers. Petitioners ignore the fact that all of them always had an incentive to purchase respondents' Wilmington oil cheaply, that none could afford to demit from the pipeline club, and that all of them profited from the underpricing scheme.

Exxon and Texaco argue that the scheme to fix crude prices was implausible because they sold more crude at posted prices than they bought and that the 1962 agreement was simply a technical revision unrelated to pricing. They contend that the necessity of using co-petitioners' pipelines provided them no incentive to join the conspiracy, citing respondents' inability to produce a document from the pipeline owners threatening to cut off access if they did not join the conspiracy. As the Court of Appeals correctly decided, these arguments are properly directed to a jury.

A. Texaco

Texaco's argument that it had no motive to enter into the conspiracy because it always had more crude than it needed (Exxon Pet., pp. 6, 21-22) is contradicted by the evidence. Texaco became a net purchaser of heavy crude before completing the modernization of its Wilmington refinery in 1967 to better refine heavy crudes.[62] Texaco states that respondents conceded that Texaco did not have an incentive to keep crude prices low. Exxon Pet., p. 6. No such concession existed. It says that it sold more than 50 million barrels of California crude oil at posted prices. Pet., p. 6. Respondents introduced evidence that during the same period, Texaco purchased over 70 million barrels for a net purchase position of 20 million barrels.[63] Respondents intro-

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[62] ER 1206, 1263. An internal document states that a proposal to increase California crude prices "would result in a very substantial loss of earnings to Texaco" because "(1) Although we appear to be a net crude marketer in California our production includes substantial quantities of royalty oil which is actually purchased." ER 1206.

[63] Texaco's purchases included 20 percent of the joint venture's total Tract 1 production, an enormous amount of crude purchased at up to $1 per barrel less than its 3-cut exchange value. Texaco argues that it would

duced evidence that Texaco's motive in improving its Wilmington refinery was to take advantage of low heavy crude prices—the same motive that prompted Exxon to build its Benicia refinery.[64] Texaco decided to modernize its refinery by 1962.[65] Texaco expected large profits from its investment which depended on continued maintenance of low heavy crude prices. ER 1208, Supp. ER 2717, 4383.

Access to the pipeline network was essential to Texaco which owned only one inadequate pipeline. Costs of alternative transportation would have been "prohibitive."[66] Texaco knew it was "at

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have been irrational for it to join a conspiracy to depress crude prices because it traded away millions of barrels of heavy crude for light crude at posted prices after the 1961-62 meetings. Pet., p. 21. Respondents introduced evidence that the trades to obtain light crudes were a part of a quota transaction, *i.e.*, a deal whereby Texaco obtained import quota tickets at a substantial discount from their market value. Texaco traded one profit opportunity (underpriced heavy crude) for a greater opportunity (discounted quota tickets). Clerk's Docket 1620, Exh. 14.

Texaco also states that as late as 1968, it was turning down opportunities to buy California crude oil at posted prices and that, instead, Texaco needed to secure outlets for its excess supply. Pet., p. 6. Texaco's own documents reveal that Texaco refused to sell crude by the early 1970's because the company was facing a crude deficit. ER 1259-60, 1263. It further states that it profited when posted prices increased and lost revenues when prices declined. *Ibid.* Respondents' evidence established that this was certainly not true throughout the 1971-77 damage period.

[64] ER 779, 798, 875.

[65] By 1967 it had added cracking and coking capacity to refine residuum. ER 3889.

[66] Texaco's Manager of Pipelines and Crude Oil Purchases and Sales wrote in 1971: "We cite the following reasons for our use of Badger Type [3-cut] Exchange arrangements: 1. The West Coast majors favor their use and we are dependent upon them for the movement of the major portion of our crude oil avails. 2. Much of our crude is lower gravity and based on the Crude Rating Statements values, cannot be exchanged on a value basis without penalty. 3. We have no alternative but to rely primarily on the use of Badger Exchanges, since the cost of trucking our exchange crude would be prohibitive." ER 1225.

the mercy" of the pipeline owners.[67] Texaco estimated that 98.5 percent of its exchange volume was on a 3-cut basis.[68] Pipeline club membership gave Texaco the necessary access and diminished the penalties involved in trading crude at posted prices.[69] As a participant in the negotiations of the 1962 agreement, it was fully aware of the purpose of the scheme when it joined the club and followed its rules.

B. Exxon

Exxon argues that it was a net crude seller at posted prices until 1969, when its Benicia refinery began operating, and that its discoveries of crude in California and Alaska caused it to prefer higher crude prices.[70]

Exxon realized no production from Alaska until 1977, near the end of the damage period, and none from the Santa Barbara properties until the later 1980's. ER 986, 1023. Exxon anticipated as early as 1962 that when its refinery opened it would be a net buyer of California crude. ER 1054. Exxon's statement that in the late 1970's it "considered closing its California refinery but decided to continue with an operation to support the demand for crude oil to help maintain higher prices" (Exxon Pet., pp. 5-6) was contradicted by respondents' evidence that Exxon retained the refinery because it was then its most profitable option. Supp. ER 150, 195.

Exxon understood it required very large volumes of heavy crude at low prices to achieve the large profits it anticipated from such a refinery.[71] It expected heavy crude prices to remain depressed.

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[67] ER 1252-53. "Over 90 percent of our domestic supply is received via other company [pipe] lines on exchange."

[68] ER 1225, 1197-98.

[69] ER 1225. Much of Texaco's own production was heavy crude which it could not exchange on a posted price basis without a loss of value. ER 1264.

[70] ER 1054.

[71] ER 904, 915, 857, 875, 779, 795, 798-99, 864-65, 880, 888, 888-A, 1033, 1049, 851-860, 901.

ER 861, 865-66, 880. Before it ever planned to enter the refining market, it knew that it would be selling crude until its refinery was built, and it also knew that posted prices for crude were below market value.[72] Nevertheless, it joined the club because it knew that pipeline access was essential because it had no pipelines.[73]

Exxon sent scouts to study the California market before deciding to build a refinery. They met with the Majors and were told in confidence as early as 1965: (1) how the 3-cut exchange system worked;[74] (2) that the California refiners "worked closely together"; (3) that 3-cut exchanges were used because posted prices did not reflect crude values and (4) that pipeline club members refused to trade crudes of unequal quality on a posted price basis.[75]

Exxon's argument that it would have fought the club, rather than join the conspiracy to depress prices of heavy crude, might persuade a jury, but it cannot sustain summary judgment. The risks of such litigation against its world market peers could hardly be viewed as an attractive alternative to operating a profitable refinery and achieving access to the pipeline network.

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[72] ER 782, 1054, 875, 864-65.

[73] ER 865, 886, 888-A, 1034. Exxon fully understood without explicit threats that it was subject to the market power of the pipeline owners. Exxon's petition admits that its exchange partners "required" it to engage in 3-cut exchanges. Exxon Pet. at 21. Without such exchanges Exxon could not move its crude to its refinery. Respondents refuted Exxon's argument that it did not need pipeline club membership successfully to do business in the market because its pipeline needs were supplied by non-defendant Getty. Pet., p. 17. Before its acquisition, Getty was also a member of the pipeline club. Moreover, Exxon's crude was tributary to Socal's line, as well as to Getty's, and two of its three large 3-cut exchanges for movement of its crudes were with Socal. ER 841.

[74] ER 840-42, 848, 850, 834.

[75] ER 821, 824, 828, 842, 848.

PETITIONERS' EXPLANATIONS OF THE 3-CUT EXCHANGE ARE CONTRADICTED BY THE RECORD

To escape the web of the price-fixing conspiracy, petitioners argue that the 1962 agreement was simply a "technical revision" which did not fix prices on exchanges and which had no effect on posted prices. The argument fails on the record, on elementary economic principles and on controlling authority.

1. Petitioners argue that the 3-cut exchange agreement was merely a means of creating market efficiencies among refiners by saving transportation costs. Socal Pet., p. 5. Transporting crude through pipelines is efficient. The formulae were not used to improve transportation efficiency. They only priced exchanged crudes. The pricing code was not earlier used on exchanges in California, and it was never used anywhere else. When it was virtually abandoned in the mid-1970's, no disruption of the transportation system occurred. Petitioners have offered no evidence to demonstrate any competitive efficiencies flowing from the 1962 agreement.[76]

The complex and costly formulae were irrelevant to the enjoyment of the efficiencies of crude oil exchanges and pipelines. That efficiency is fully achieved using posted or individually negotiated

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[76] It is no defense to price-fixing that the agreement served some other purpose by creating some kinds of efficiencies. *E.g., Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) (maximum fee schedule for competing physicians *per se* unlawful despite effectiveness as a cost-containment mechanism saving patients' and insurers' money); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (price visibility removal of barrier to market entry no defense to price-fixing); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978) (banning competitive bidding to minimize risk of inferior engineering work no defense to price-fixing); *United States v. Masonite Corp.*, 316 U.S. 265 (1942) (despite desirable consequences and good business reasons for price-fixing arrangement, scheme was illegal *per se*); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (beneficial results from increasing depressed gasoline prices no defense to price-fixing); *Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, ____ U.S ____, Supreme Court Docket Nos. 88-1198, 88-1393 (Jan. 22, 1990) ("[I]t is not our task to pass upon the social utility or political wisdom of price-fixing agreeements").

prices to value any differences in quality or quantity among exchanged crudes.

In fact the formulae sacrificed efficiency for secrecy. While complexity made the formulae difficult to penetrate, it also created an administrative nightmare for club members. It involved costly laboratory testing, sampling, compositing, storage and shipment of samples, crude assays, development of uncontrollable cut imbalances on books of account, account discrepancies between the exchange partners, and difficulty in settling cut imbalances involving negotiation of byzantine three and four party clearinghouse book transfers of cuts.[77] Substantial cut imbalances amounting to hundreds of thousands of barrels persisted for many years.[78]

2. Contrary to petitioners' argument (Socal Pet. p. 11), the question whether a particular pricing agreement is *per se* illegal does not turn on whether the agreement is proved by direct or circumstantial evidence.[79] However proved, an agreement setting prices among horizontal competitors is *per se* illegal if it threatens "the proper operation of our predominately free-market economy

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[77] ER 962, 1109-10, 1900, 1968, 1969, 1978-80, 2434, 3025, 3064, 3129-30, 3216-17, 3238-39A, 998, 1999, 3012-13, 3029-30, 1906, 1967.

[78] ER 959, 1028, 1031, 1217-18 , 1897-99, 2405-07, 2408, 2259, 3029-30, 1963.

[79] Petitioners rely on language from the Court of Appeals' opinion indicating its reluctance to hold the 3-cut exchange agreement illegal *per se* because the court was unsure whether the agreement had procompetitive aspects. The court said: "Whatever the effect of the three-cut exchange is on posted prices, the agreement concerning the exchanges themselves cannot be flatly classified as a price-fixing arrangement." Socal Pet. App., p. 8a.

If respondents' evidence that the purpose was to depress posted prices is ultimately credited by the trier of fact, the case cannot be successfully distinguished from *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 219-20: "Proof that there was a conspiracy, that its purpose was to raise prices, [here to depress prices] and that it caused or contributed to a price rise [here stability at depressed prices] is proof of the actual consummation or execution of a conspiracy under § 1 of the Sherman Act."

—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.' " *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-20 (1979). Petitioners have not even begun to demonstrate that the effect of the challenged price-fixing agreement was to increase economic efficiency and render the relevant crude market more competitive.

RESPONDENTS PRIMA FACIE PROVED THE CONSPIRACY

In addition to proving the explicit agreement among petitioners, other direct and circumstantial evidence provided an abundance of plus factors *prima facie* establishing every element of a price-fixing conspiracy.

The posted price-fix could never have worked unless all members of the pipeline club followed the rules of the game. Those rules included never bidding against each other either on the exchange or in the public markets. No legitimate business justifications existed for paying each other higher than posted prices on exchanges. If prices in the exchange market reflected refinery values, so should posted prices. If the formulae provided a better measure of crude quality than gravity, why did petitioners not post prices based on refinery product yield instead of gravity? The crude was identical in both markets: exchanges were made before the crude even left the Wilmington field.

Direct and circumstantial evidence was used to establish petitioners' subjective intent to fix posted prices, and respondents produced ample evidence for that purpose.

REASONS FOR DENYING THE PETITIONS

Petitioners' arguments are based on two premises both of which are wrong: (1) the district court's findings were not controverted or, if they were, that court could properly decide issues of credibility, resolve conflicts and weigh the evidence on summary judgment; and (2) respondents' proof of conspiracy rested alone

on circumstantial evidence such as conscious parallelism. Based on these erroneous premises, petitioners argue that *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), required the Court of Appeals to affirm.

Petitioning separately, Exxon and Texaco argue that even if their co-petitioners conspired, Exxon and Texaco had no incentive to join a conspiracy to depress posted prices, and the Court of Appeals erred in failing separately to consider the evidence as to each of them. Again, the record belies their contentions.

A. Triable Issues Of Fact Foreclosed Summary Judgment

Petitioners have steadfastly refused to cite or even acknowledge respondents' evidence contradicting the "findings" of the district court. Instead, they rely on the findings themselves as if they were made by a trial court following a non-jury trial on the merits. The district court "tried" the case on summary judgment in violation of settled principles of summary judgment law. *E.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

B. Respondents' Evidence of Conspiracy Was Direct, Not Only Circumstantial

Without citing respondents' direct evidence, petitioners argue that respondents relied on circumstantial evidence alone because the district court concluded that the 1962 agreement did not fix exchange prices or, if it did, that those prices did not adversely affect posted prices. Therefore, they contend, supported only by their characterization of passages in the Court of Appeals' opinion, that all of respondents' evidence must have been circumstantial.

Petitioners have tried to distract the Court from respondents' direct evidence that the 1962 agreement adopted exchange pricing formulae to which all petitioners adhered, that their purpose and intent in adopting such formulae was to maintain depressed posted prices for heavy crude and that the scheme succeeded in creating two-tiered pricing for the same crude in the same oil field —a phenomenon unheard of in a competitive market.

On respondents' evidence, the 3-cut exchange agreement was a horizontal price-fixing agreement forbidden by *United States v.*

Socony-Vacuum Oil Co., 310 U.S. 150. It was a dual price-fix because it set exchange prices as well as posted prices. The exchange market-price-fix gave petitioners the means for maintaining depressed posted prices.[80]

Such an agreement is the "archetypal example" of an anticompetitive practice. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980). Whatever economic arguments may be used to attempt justification of a horizontal price-fixing agreement, "they are all banned because of their actual or potential threat to the central nervous system of the economy." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 224, n. 59.[81]

Circumstantial evidence simply reinforced the conspiratorial nature of the agreement and its purpose to create and to maintain the two-tiered pricing system. The complexity of the scheme and the nightmarish administrative problems its created for petitioners, the rigging of Alaska crude prices and the exchange of advance pricing information among them buttressed the direct evidence of petitioners' conspiratorial scheme and its illegal purpose.[82]

When, as here, an antitrust plaintiff has produced direct evidence that horizontal competitors entered into an explicit agreement adopting formulae to set prices, no examination of their reasons for doing so need be probed. To complete their *prima*

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[80] In *Socony-Vacuum* the Court concluded that the raising and maintenance of spot market gasoline prices "were but the means adopted for raising and maintaining prices to jobbers and consumers." 310 U.S. at 191.

[81] *Accord: Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 346-347 (1982) ("We reaffirm what we said in *United States v. Socony-Vacuum Oil Co. . . .*"); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956).

[82] The Socal petitioners say: "There is not a shred of evidence anywhere in the record to support a theory of a four-company conspiracy." Socal Pet., p. 26. What respondents did produce was direct evidence of an eight-company conspiracy (all petitioners, plus ARCO and Getty).

facie case, respondents were only required to produce sufficient evidence to go to a jury that the price-fixing agreement caused some antitrust injury to respondents within the meaning of § 4 of the Clayton Act. *E.g., Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100 (1969); *Continental Ore Co. v. United Carbide Corp.,* 370 U.S. 690, 697 (1962). Respondents, as sellers of crude oil produced abundant evidence for that purpose.

Texaco and Exxon argue that evidence to connect them with the conspiracy was only circumstantial and that they had no motive to join a conspiracy to depress posted prices because they were net sellers of crude at posted prices. Respondents' evidence contradicted them. Texaco was present when the 1962 agreement was negotiated. Exxon was not present at creation, but it, too, joined the pipeline club and both followed all the rules of the members' game. As this Court said in *United States v. Masonite Corp.,* 316 U.S. 265, 275-76, the purpose and the effect of the 1962 agreement were known to both of them:

> "The circumstances surrounding the making of the 1936 [1962] agreements and the [subsequent] joinder . . . of the two other companies leave no room for doubt that all had an awareness of the general scope and purpose of the undertaking. As this Court stated in the Interstate Circuit case (306 U.S. p. 227 . . .): 'It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.' "

Respondents produced ample evidence contradicting the assertions of Texaco and Exxon that they had no incentive to join a conspiracy in which an objective was maintenance of low posted prices. Although Texaco and Exxon did not initially derive as much benefit from depressed posted prices, their long-range plans were based on continued underpricing of heavy crude. A key factor in Texaco's modernization of its Wilmington refinery and Exxon's decision to enter the refining market and build its Benicia

refinery designed specifically to process heavy crude was the expectation that underpricing of heavy crudes would continue into the 1980's. Although the Court of Appeals did not expound at length on the evidence linking Texaco and Exxon to the conspiracy, the Court recognized the critical importance to those petitioners of pipeline access, low priced crudes to implement their long-range plans and the knowledge of each that continued underpricing of heavy crudes would make them profits.[83]

All of the petitioners knew that if competition had broken out either in the exchange or open markets, the system would have fallen apart. All petitioners insured that it did not fall apart in trading either California or Alaska crudes. The declarations of independence by Exxon and Texaco must be addressed to a jury.

Although the reasoning in the Court of Appeals' opinion was far more favorable to petitioners than the record justified, its conclusion is unassailable. The petitioners were not simply moving on parallel tracks, they were interlocked in their 3-cut exchanges on their pipeline network. They did not merely follow one another's prices, they all used the same pricing formulae. They did not belong to separate clubs following similar patterns of conduct, they were horizontal competitors belonging to the same club, obedient to the same rules. Adherence to those rules was a material cause of respondents' antitrust injury. No more evidence was necessary to take the case to a jury.

Petitioners' reliance on *Matsushita* is totally misplaced. In that case, plaintiffs charged a Japanese cartel with an implausible conspiracy to monopolize the American consumer electronics market by underpricing its products for 20 years. Plaintiffs produced no direct evidence of any combination related to a predatory pricing scheme upon which their claim for antitrust injury was based. Defendants produced justifiable reasons for their pricing activity, and plaintiffs failed to produce any evidence that the cartel had any rational reason to engage in the alleged predatory pricing conspiracy, the success of which was highly

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[83] As in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), the evidence revealed " 'a meeting of minds in an unlawful arrangement.' " (*Id.* at 764), and all of the petitioners played by " 'the rules of the game' ". (*Id.* at 766).

improbable from the outset. Moreover, if any such scheme ever existed, it had failed and the market was not monopolized.

Respondents' evidence is light years away from *Matsushita*. A price-fixing agreement was directly proved, plausible incentives for concerted action by all petitioners were established, benefits to each participant were contemplated and received, and the scheme was successful in fixing prices paid to respondents and other independent producers. It is the inference of independent action that is implausible in this case.

Petitioners' attempt to demonstrate a conflict among the circuits over the interpretation and application of *Matsushita* provides no reason to grant the petitions in this case because the claimed conflicts are irrelevant to the issues created by this record.[84]

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[84] Petitioners attempt in vain to demonstrate a relevant conflict among the circuits. *Park v. El Paso Bd. of Realtors*, 764 F.2d 1053, 1060-61 (5th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986), in fact, predates *Matsushita*. Petitioners rely on vertical restraint cases irrelevant to this horizontal price fixing case. In petitioners' Eighth Circuit case, *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F.2d 323, 330 (8th Cir. 1986), *cert. denied*, 108 S.Ct. 1728 (1988), the court ruled for defendant manufacturer in a vertical dealer termination dispute and applied the principles of *Matsushita*. The Eighth Circuit in vertical restraint cases routinely weighs competing inferences, contrary to petitioners' assertions (*e.g., Ryko Mfg. Co. v. Eden Services*, 823 F.2d 1215, 1229 (8th Cir. 1987) *cert. denied*, 484 U.S. 1026 (1988)), as does the Eleventh Circuit. *E.g., Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1579-83 (11th Cir. 1988). The Eleventh Circuit case petitioners stress as evidencing the alleged conflict, *Helicopter Support Systems v. Hughes Helicopter*, 818 F.2d 1530 (11th Cir. 1987), is another vertical dealer termination case. *Helicopter* specifically applied principles from *Matsushita*, holding that (1) the conspiracy was economically reasonable (*Id.* at 1534), (2) the evidence tended to exclude the possibility of independent action (*Id.* at 1535), and (3) there was direct evidence of a price-fixing conspiracy. *Id.* at 1536. *Long Beach I* is not a proper case for addressing a purported conflict among vertical dealer termination cases.

CONCLUSION

Respondents carried their burden on summary judgment of proving every element of their *prima facie* price-fixing case. The Court of Appeals correctly decided that triable issues of fact foreclosed summary judgment in petitioners' favor. The district court's findings of fact could not be sustained without rewriting settled summary judgment law.

Even if any conflict existed among the circuits in interpretation of *Matsushita*, resolution of those conflicts would not overturn the decision of the Court of Appeals reversing the district court's summary judgment.

If a writ of certiorari were granted in order to correct flaws in the Court of Appeals' rationale, *Socony-Vacuum* would dictate affirmance because the 1962 agreement cannot successfully be distinguished from the horizontal price-fixing conspiracy condemned as a *per se* violation of §1 of the Sherman Act in that case. The Court has just reaffirmed *Socony-Vacuum* in *Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n* ____ U.S. ____, Supreme Court Docket Nos. 88-1198, 88-1393 (Jan. 22, 1990).

The history of this case is a melancholy testament to the abuse of pretrial procedures to avoid ever trying a case. This case should have been tried on the merits more than ten years ago. Further delay in bringing this case to trial should not be countenanced.

The petition for writ of certiorari should be denied.

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Respectfully submitted,

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